IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/08/252/2018**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

NEPHAT CHIMBWE **APPELLANT**

AND

CONSERVATION FARMING UNIT **RESPONDENT**

CORAM: SIAVWAPA, JA

On 12th April 2019 and 26th April 2019

FOR THE APPELLANT: Mr. M. Lungu with Mr. W. Shakalima both of Mesdames Suba and Tafeni Associates

FOR THE RESPONDENT: Miss M Siansumo of Messrs. Malambo & Co

RULING

Cases Cited:

1. Nahar Investments v Grindlays Bank International 1984 Z.R 81
2. Racheal Lungu Saka v Hilda Bwalya Chomba (sued as administratrix of the estate of the late J.M Chomba) and the Attorney General CAZ/08/05/2017

3. Stanley Mwambazi v Morrister Farms 1977 Z.R 108
4. Chisanga Mushile Mulenga v ZESCO Appeal No 8/49/2015
5. Raymond Muimo v Pascal Ndakala and Maggie Ndakala CAZ/08/053/2016

Legislation Cited:

1. Court of Appeal Rules, 2016

This is a ruling on two applications, the first is for an order to dismiss the Appeal for want of prosecution while the cross-application is for leave to extend time within which to file the record of appeal.

On the 21st March, 2018 the Respondent filed summons to dismiss the appeal for want of prosecution pursuant to **Order 10 Rule 7 of the Court of Appeal Rules** as the sixty days had elapsed following the filing of the Appellant's notice and memorandum of appeal.

In arguing the application, the Respondent relied on the case of **Nahar Investments v Grindlays Bank International (1)** which provides that the applicant ought to comply with the rules of the Court. The Respondent further relied on the case of **Racheal Lungu Saka v Hilda Bwalya Chomba (sued as administratrix of the estate of the late J.M Chomba) and the Attorney General (2).** The Respondent stated that there was laxity on the part of the Appellant to take steps to secure their interests despite knowing the time limits.

In opposition to the application, the Appellant stated that the delay in filing the record of Appeal was caused by the fact that the transcript of the proceedings in the court below has not been typed. The Appellant further contended that the Respondent would not suffer any prejudice if the appeal were heard on its merits as there is no stay of execution on record.

The Appellant also relied on the **Nahar case** cited above and cited the case of **Stanley Mwambazi v Morrister Farms (3)** to demonstrate that this is not a fit and proper case to dismiss the appeal as there was no unreasonable delay or improper conduct on the part of the Appellant.

In reply, it was the Respondent's submission that there was no proof on record to show that the Appellant is making any efforts to prepare the record of appeal.

The cross-application for an order for leave to extend time within which to file the record of appeal is made pursuant to **Order 13 rule (1)(c) and rule 3(3) of the Court of Appeal Rules.**

Under this application, the parties largely repeated the arguments under the first application. The Appellant went on to rely on the case of **Chisanga Mushile Mulenga v ZESCO (4)**. Counsel for the Appellant stated that in the aforementioned case the court upheld the delay in typing the notice of proceedings as a reason to enlarge time.

In opposition, the Respondent argued that the Appellant did not seek the leave of this court to file the application for leave. The Respondent relied on the case of **Racheal Lungu Saka** earlier cited where guidance was given on applications under **Order 13 Rule 3(3) of the Court of Appeal Rules**. The Respondent concluded by stating that the application for leave was incompetently before me.

I have read the affidavits on record and carefully considered the submissions from both parties. From the facts on record, it is clear that the Appellant filed a Notice of Appeal and Memorandum of appeal on 15th October, 2018. The period within which the Appellant was to file the record of appeal elapsed on 14th December, 2018. This means there has been a delay of 97 days by the Appellant.

As the two applications are related, I shall first deal with the issue raised by the Respondent in relation to the application for leave being incompetently before me.

A perusal of the summons shows that the application for leave is filed pursuant to **Order 13 Rule 3(3) of the Court of Appeal Rules**. This rule gives power to this court, where there is sufficient reason, to extend the time for making an application.

From the provision cited it is clear that the Appellant was applying for leave to apply for an extension of time. This reiterates what we stated in relation to the effect of **Order 13 Rule 3(3)** in the **Racheal Lungu Saka Case** cited above, it then follows that the application is competently before this court.

Having established that there was a delay of 97 days in this matter, I have noted that the reason for the delay is that the transcript of proceedings has not been prepared by the registry. The delay is therefore not the Appellant s fault.

I also note that times without number the procedure to be followed where there is a possible delay has been set out, parties must apply for enlargement of time before the expiry of the time within which to file the record of appeal. Counsel for the Appellant cited the **Chisanga Case** above, in an effort to show that there was a valid reason to extend time but the said case is not helpful to the Appellants case.

In the instant case, the Appellant deserves the benefit of a doubt because there have indeed been challenges of typing and printing transcripts in the registry. Furthermore, the Appellant did not just sit still but made a step in the matter by filing for leave to extend time. This distinguishes this case from the **Chisanga case** above mentioned.

I therefore restate the position of this court in the case of **Raymond Muimo v Pascal Ndakala and Maggie Ndakala (5)**, where we held that cases should be heard on their merits rather than allowing them to be defeated on technicalities. In my view, this is a proper case in which to grant an extension of time.

I accordingly dismiss the application to dismiss the appeal for want of prosecution and order that the Appellant should file the Record of Appeal and Heads of argument by 31st May 2019. Costs are for the Respondent in any event.



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M. J. SIAVWAPA

COURT OF APPEAL JUDGE